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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 497

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AND LOCAL UNION 549,
Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

OVERNITE TRANSPORTATION COMPANY AND RUTHERFORD FREIGHT LINES, INC.,
Intervening Appellees.

On Appeal from a Decision of a Three-Judge United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT.

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OVERNITE TRANSPORTATION COMPANY AND RUTHERFORD FREIGHT LINES, INC.,
Intervening Appellees.

On Appeal from a Decision of a Three-Judge United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

Three civil actions were consolidated in the court below —Nos. 644-65, 684-65 and, the instant case, 894-65. The opinion of the court in the consolidated cases is reported

at 253 F. Supp. 481 and is reproduced in Appendix A, *infra*. The court's judgment appears in Appendix B, *infra*. The report of the ICC appears at 97 M. C. C. 568, and is reproduced in Appendix C, *infra*.

JURISDICTION.

Complaint was filed by appellants on April 16, 1965, to set aside an order of the Interstate Commerce Commission. The jurisdiction of the three-judge District Court was invoked pursuant to 28 U. S. C., §§ 1336 and 2321-2325. The court issued an opinion, constituting its findings of fact and conclusions of law, filed April 20, 1966. Final judgment dismissing the complaint was entered on May 4, 1966. Notice of Appeal was filed in the District Court by appellants on July 1, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b). See **American Trucking Associations, Inc. v. United States**, 364 U. S. 1; **Schaffer Transportation Co. v. United States**, 355 U. S. 83.

STATUTES INVOLVED.

The pertinent provisions of Section 5 of the Interstate Commerce Act, 49 U. S. C., Sec. 1, et seq., are as follows:

> "5 (2) (b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, . . . If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reason-

able, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: . . . ."

"5 (2) (c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: . . . (4) the interest of the carrier employees affected."

"5 (2) (f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, . . ."

QUESTIONS PRESENTED.

1. Whether the court below erred in sustaining the Commission's interpretation of Section 5 (2) (c) of the Interstate Commerce Act, 49 U. S. C., Section 5 (2) (c), as permitting the Commission to impose conditions for the protection of employees adversely affected by an amalgamation or merger of two motor carriers of a substantially lesser nature and degree than conditions ordinarily imposed to protect similarly situated employees adversely affected by amalgamation or merger of railroads?

2. Whether the court below erred in failing to find and conclude that Section 5 (2) (c) of the Interstate Commerce Act, as interpreted and applied by the Commission in the manner aforesaid, contravenes the due process clause of the Fifth Amendment of the Constitution of the United States in that, as compared to railroad employees, the provision arbitrarily and capriciously classifies motor carrier employees, and effects invidious discrimination against them in the protection afforded against losses incurred as a result of amalgamation or merger?.

3. Whether the court below erred in sustaining an Order whereby the Commission imposed conditions for the protection of employees adversely affected by an amalgamation or merger of two motor carriers of a substantially lesser nature and degree than conditions ordinarily imposed to protect similarly situated employees adversely affected by amalgamation or merger of railroads, without establishing a factual basis for such differentiation, based on the record before it, or otherwise offering a reasoned or rational explanation therefor?

4. Whether the court below erred in sustaining an Order whereby the Commission limited the protection afforded employees upon merger or amalgamation of two motor carriers to three-months severance pay, without factual or rational support for such limitation?

STATEMENT OF THE CASE.

A. Proceedings Before the I. C. C.

Overnite Transportation Company of Richmond, Virginia (hereafter called "Overnite") and Rutherford Freight Lines, Inc. of Bristol, Virginia (hereafter called "Rutherford"), by a joint application[1] filed March 21, 1963 with the Interstate Commerce Commission (hereafter called "ICC" or "Commission"), sought authority under section 5 of the Interstate Commerce Act for the purchase by the former of the operating rights and property of the latter. Appellants (collectively referred to herein as "Union") intervened for the purpose, *inter alia,* of seeking certain employee protective conditions with respect to those employees who would be adversely affected by the acquisition, if granted by the ICC.

Pursuant to an Order of the ICC, dated May 20, 1963, a hearing was held before Examiner David S. Letts on June 25 and 26, 1963, at which hearing the parties appeared and presented evidence as follows:

Rutherford's employees include 175 drivers, and 49 administrative personnel. Of the total of 224 employees, Overnite would expect to employ 132, leaving the balance of 92 persons to be separated as a result of the proposed transaction. Rutherford's drivers are members, and have for many years been members, of the Union, their employment conditions being governed by successive and various collective bargaining agreements (Exh's 7, 8, 10, and 11; Tr. 243). None of Overnite's employees are unionized (Exh. 25; Tr. 14; H. E. Report, p. 5).

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[1] All documents referred to herein, including briefs ("Br."), exhibits ("Exh."), transcript ("Tr."), the report of the hearing examiner ("H. E. Report"), and the report of the I. C. C. ("ICC Report"), are part of the original record before the ICC and the court below which has been certified to and filed with this Court.

The Union urged, *inter alia*, that if the application were approved the ICC should impose upon Overnite the same or similar employee protective conditions as the ICC consistently imposes upon railroads in similar circumstances. More specifically, the Union argued for these protections:

1. For former Rutherford employees who retain employment status but who either because of displacement from their former positions or because they otherwise suffer a loss of former income or benefits because of their employment with Overnite, a monthly displacement allowance should be paid to compensate them for a period of four years, for any such loss based on their average earnings for the year preceding such displacement.

2. For dismissed employees, that is, those who lose jobs entirely, either a monthly dismissal allowance equal to the aforementioned displacement allowance, or a lump sum separation allowance determined in accordance with a schedule of benefits based upon length of service, should be paid.

3. In the event employees are required to change their residence, as a result of a transfer of routes, conditions should be imposed insuring such employees against losses in the sale of real estate, broken leases, and for reimbursement of moving expenses for themselves and families.

4. Recognition of years-of-service seniority held by Rutherford employees should be given for all purposes.

5. Any dispute arising out of the application of the foregoing protective conditions should be submitted to arbitration for determination (Br., pp. 27-28).

With respect to employee protection, the sole commitment advanced by Overnite in its application (Exh. D, attached thereto, par. D 5) was the following: "It

proposes to interview all of transferor employees who so desire to be interviewed relative to their becoming connected with transferee in the area in which they are presently employed in suitable capacities." At the hearing, Overnite made further representations as follows:

1. As to employees who will be displaced or separated, Overnite will grant no protection or benefit (Tr. 129).

2. With respect to former Rutherford employees who may be employed by Overnite but required to move their homes, possessions and families to another location, Overnite stated "that it would pay something" (Tr. 129; see also Tr. 120). "You move a fellow 15 miles, what we allow may pay all his expenses, but may not pay all of the expenses of a man who moves two or three hundred" (Tr. 129). Apart from partial payment of actual moving costs, Overnite will pay nothing—including losses incurred in the sale of homes or real estate or similar losses resulting from the transfer (Tr. 130).

3. In employing former Rutherford employees, Overnite will apply the present Overnite rates, compensation and benefits in all instances, including those instances where the Overnite rates, compensation or benefits might be less than those presently accorded the Rutherford employees (Tr. 123; 133-4).[2]

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[2] The record contains substantial evidence that such instances may well occur. Thus, the mileage rate for Overnite line-haul drivers is 8½¢, while the mileage rate for Rutherford line-haul drivers varies from 9.25¢ to 10.3¢ (Tr. 132-133, 148; Exh. 7, Art. 23, Sec. 1, p. 38). Rutherford's warehouse employees are better paid than those of Overnite (H. E. Report, p. 5). Rutherford employees enjoy more liberal vacation benefits than do employees of Overnite. (Tr. 110-111, 165; Exh. 7, Art. 29, pp. 55-57; Exh. 8, Art. 20, p. 32; Exh. 10, Art. 20, pp. 31-32; Exh. 11, Art. XXII, pp. 34-35). Rutherford employees are governed strictly by seniority with respect to advancement, demotion, lay-off, recall, bidding, filling of vacancies, etc. At Overnite, these matters are governed by other considerations

4. While Overnite's offers of employment to Rutherford employees may be made in order of seniority, Overnite will unilaterally determine each employee's qualification and ability as a condition to employment (Tr. 116, 130, 157, 162). Once employed, a Rutherford employee will be immediately eligible for holiday, vacation and insurance benefits, as though he had worked for Overnite (Tr. 161). However, his years of service with Rutherford will avail him nothing in the area of job security and advancement, *e. g.*, lay-off, recall, bidding for jobs, equipment, routes, transfers, or "bumping" (Tr. 163). And this despite the fact that many employees of Rutherford have accumulated many years of seniority (Tr. 228).

On October 1, 1963, the Hearing Examiner issued his Report and Order recommending approval of the acquisition. **Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.**, No. MC-F-8393. The sole condition recommended for the protection of employees was three months severance pay for displaced Overnite employees or separated Rutherford employees, disputes over the foregoing to be submitted to arbitration, as follows:

> [A]ny employee of Rutherford Freight Lines, Inc., separated from his position with that carrier on and after the date of this report or any employee of Overnite Transportation Co., displaced by an employee of Rutherford Freight Lines, Inc., because of the transaction herein authorized, shall receive for a period of not more than three months, severance pay from Rutherford Freight Lines, Inc., or Overnite Transportation Co., respectively, at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, said pay-

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(Exh. 7, Art. 5, p. 12; Exh. 8, Art. 2, p. 7; Exh. 10, Art. 5, p. 12; Exh. 11, Art. V, p. 12; Tr. 116-119, 127, 130, 150, 155-157, 161-164).

ments, however, to be reduced by the amount of his total wages earned during the period in which he was otherwise employed during the three months, including unemployment benefit payments received under any unemployment insurance; and provided, further, that in the event of any dispute or controversy arising with respect of the protection, afforded under the foregoing condition, which cannot be settled by the carrier and employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee, for consideration and determination, the formation of which committee, its duties, procedures, expenses, etc., shall be agreed upon by the carrier and the employee, or his duly authorized representative. (H. E. Report, pp. 13-14.)

On November 20, 1963, the Union filed timely exceptions with the ICC, complaining, *inter alia,* of the Examiner's refusal to impose the employee protective conditions requested by the Union and relying principally upon **Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO v. U. S.**, 221 F. Supp. 959 (D. D. C. 1963), a prior decision of the district court in a companion case, wherein it was ruled:

> The case will be remanded to the Commission for further proceedings not inconsistent with this opinion. We need not here attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc. That is a subject reserved, subject to judicial review, for the determination of the Commission in the first instance. But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of America Buslines,

Inc., without a reasoned explanation of its denial, consistent with what has here been said. **Cf. Eastern-Central Motor Carriers Association v. United States,** 321 U. S. 194, 210 (1944).

On July 31, 1964, the ICC issued its Report in the instant case, denying the relief requested by the Union, and responding to the foregoing mandate of the district court as follows:

> In the first place, as previously noted, the law does not require that provisions for the protection of motor carrier employees be imposed. In addition, the skills of motor carrier employees are more adaptable than the more technical and limited skills of most railroad employees. Motor carrier maintenance employees are more readily absorbed into maintenance work in garages and similar establishments, truck drivers are employable in numerous industries in addition to motor carrier operations, and clerical workers are readily absorbed into industry. Even employees with more technical skills are more readily absorbed into the expanding trucking, bus, and public automobile businesses. The rail transportation industry, on the other hand, is unique in that it generally has a full complement of employees with very few openings for new employees. The trend toward fewer operating rail employees is one of public knowledge. Displaced rail employees, therefore, would encounter more difficulty in securing similar positions and, consequently, need more protection from adverse effect than do motor carrier employees.
>
> The majority of the approximately 18,500 motor carriers regulated by this Commission are considerably smaller than a majority of the railroads. The motor carriers, as a rule, do not have substantial resources, are subject to greater competition, have high operating ratios, and generally do not have the

capacity to absorb any substantial or long-term compensation awards.[2] Many motor carriers dispose of their rights and properties only because they are financially unable to continue their service to the public. Imposition of protective conditions, in such instances, often would defeat or impede the transfer and possibly result in adverse effects to service under the operating rights and to the public. In addition, it is clear that if such unifications are not authorized, the result may be the demise of the weaker carriers as well as the loss of all jobs of their employees (App. C, pp. 55-56).

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[2] We recognize that vendee here is neither small nor unprofitable.

Having concluded that its authority under section 5 (2) (c) is discretionary, the Commission proceeded as follows:

> In view of such discretion, the question presented is whether, under the circumstances presented, the condition proposed by the hearing examiner in this proceeding is just, reasonable, and adequate. We conclude that it is. It provides benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful without imposing such a burden on vendee as to imperial its financial stability or as to preclude consummation. Such condition, which we adopt as somewhat modified, is set forth in the findings herein (App. C, p. 56).

In final result, the ICC not only refused to go beyond the three months severance protection granted by the Examiner, but further qualified and diminished said protection as follows:

> Any person previously employed by either carrier and in a lay-off status on the date of service of the

order herein, and who has been in such status for a period of at least 6 months prior thereto, shall not be deemed to be an employee of either carrier on such date and thereby is not entitled to the benefits of the protective condition (App. C, p. 57).

B. **Proceeding in the Court Below.**

The Union filed its complaint on April 16, 1965, to set aside the Commission's order. Overnite and Rutherford were permitted to intervene. The instant Case No. 894-65 was consolidated with Case Nos. 644-65 and 684-65 for hearing before a three-judge court. On April 20, 1966, the court issued an opinion, constituting its findings of fact and conclusions of law, and on May 4, 1966, entered a judgment sustaining the ICC decision and dismissing the complaint. This appeal followed.

QUESTIONS ARE SUBSTANTIAL.

The proceeding, for the first time, brings to this Court for review an Order of the ICC which in broad strokes of general principle—unrelated to the case, unsupported by the record, and devoid of rational basis—decrees that motor carrier employees require and deserve far lesser protective conditions in situations of merger or consolidation than their counterparts in the railroad industry. It thus brings into question the proper application of the National Transportation Policy "to encourage fair wages and equitable working conditions" (54 Stat. 899, 49 U. S. C. preceding § 1) and of the mandate of the Interstate Commerce Act (49 U. S. C., § 5 (2) (c)) that the Commission give weight to "the interest of the carrier employees affected." Moreover, the Act, as interpreted and applied by the Commission, effects arbitrary and invidious discrimination between motor carrier employees and railroad employees, and must therefore be measured

against the Constitutional yardstick of the Fifth Amendment.

The Court has on several occasions examined the subject of employee protective conditions in the context of railroad transactions, each time with ample recognition of its importance to the National Transportation Policy and the public interest. In **U. S. v. Lowden**, 308 U. S. 225, the Court held:

> "[I]t is thus apparent that the steps involved in carrying out the congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute" (308 U. S. at 233).
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> * * * * * * * *
>
> "Congress has thus declared that fair and equitable provision for the compensation of losses thrown upon employees as the result of an authorized consolidation or lease promotes the national transportation policy by developing, coordinating and preserving the railroad transportation system" (308 U. S. at 238).

In **ICC v. Railway Labor Executives' Ass'n**, 315 U. S. 373, the Court directed the ICC to protect employees adversely affected by a railroad abandonment, despite the Commission's stand that the statute limited such remedy to cases of consolidation only.

Never before, however, has the Supreme Court given guidance to the Commission, unions, employees, carriers

and the public as to the proper protections to be afforded motor carrier employees and as to the proper interpretation of § 5 (2) (c) of the Act, particularly in its relationship to § 5 (2) (f). As a result the Commission has for years relegated motor carrier employees to a subservient role, in an absolute sense as well as in comparison with the interests of carriers and railroad employees.

Of nearly equal importance is the Commission's disregard of this Court's admonitions that decisions of administrative agencies must be supported by reason, based on the record, and directed to the facts and circumstances of the case. **Schaffer Transp. Co. v. U. S.**, 355 U. S. 83; **S. E. C. v. Chenery Corp.**, 318 U. S. 81; **Eastern-Central Motor Carriers Ass'n v. U. S.**, 321 U. S. 194.

Hence as to each of the following issues it may justly be said: "the question looms large in the administration of the Act." **S. E. C. v. Chenery Corp.**, 318 U. S. 81.

ARGUMENT.

I.

The Statute Must Be Interpreted, Particularly in Avoidance of Substantial Constitutional Challenge, as Requiring Equal Treatment Between Motor Carrier and Railroad Employees.

There can be no doubt that the particular protective conditions sought by the Union in this case[3] are those which would ordinarily be granted to railroad workers similarly situated. The protection sought here is based upon established sources and authorities developed in railroad cases: (1) the Washington Agreement of 1936, an industry-wide collective bargaining agreement between a great majority of the Nation's railroads and railroad labor organizations, which specified conditions for the protection of employees adversely affected by mergers;[4] (2) the "Oklahoma Formula", a formula derived from the protective conditions first imposed by the Commission in **Oklahoma Ry. Co. Trustees Abandonment**, 257 ICC 177, 179 (1944); and (3) the "Burlington Conditions", conditions first imposed by the Commission in and deriving their name from **Chicago, Burlington and Quincy Ry. Co. Abandonment**, 257 ICC 700, 704 (1944); (4) with respect to protection of seniority rights, see **St. Paul Bridge and Terminal R. R. Co.**, 199 ICC 588, 597 (1934); **United States v. Lowden**, 308 U. S. 225, 233 (1939); **ICC v. Railway Labor Executives' Ass'n.**, 315 U. S. 373, 374 (1943); Condition 5 of the Oklahoma Formula, 257 ICC at 198; Condition 1 of the Burlington Conditions, 257 ICC at 704.

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[3] Explained in full at page 6, *supra*.

[4] A discussion of this Agreement and its terms is found in **United States v. Lowden**, 308 U. S. 225 (1939). See also **Brotherhood of Maintenance of Way Employees v. United States**, 366 U. S. 169, 173 (1961).

In 1960 alone, the Commission conditioned its approval of Section 5 railroad transactions upon acceptance by the carriers of the Oklahoma Formula in four cases. See 307 ICC 702; 311 ICC 13, 75, 138, 147. Many other railroad cases, in which comprehensive protective conditions have been imposed, are listed in the Appendix to the Brief of the United States and Interstate Commerce Commission in **Brotherhood of Maintenance of Way Employes v. United States**, 366 U. S. 169 (1961). Even greater protection was provided in the Commission's decision and order in **Chesapeake and Ohio Ry.—Control—Baltimore & Ohio R. R.** 317 ICC 261, 346-349 (1962).

The sole pre-condition to the imposition of these protections has been a showing that some employees would be adversely affected by the transactions. **Chicago & N. W. Ry. Co. Merger**, 261 ICC 672, 675 (1946). The record in the instant case indicates clearly that employees will be adversely affected, and it was so found by the Commission, H. E. Report, pp. 12-13. Indeed, it was pursuant to that finding that the Commission immediately imposed its meager three-month severance pay condition, rather than "reserving jurisdiction."[5]

Manifestly, the consistent course of ICC decisions demonstrates that had Overnite been a railroad, rather than a motor carrier, the imposition of "railroad" conditions would have been virtually "automatic."[6] To the

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[5] In motor carrier cases, the Commission has usually "reserved jurisdiction," as it did in companion Case Nos. 644-65 and 684-65. See also, **The Greyhound Corp.—Control—Southeastern Greyhound**, 57 M. C. C. 123, 156 (1950). However, in this case and in **The Short Line, Inc.,—Purchase—New England Transp. Co.**, 75 M. C. C. 33 (1958) and **Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.**, 75 M. C. C. 147 (1958), the Commission imposed the three-month severance condition without reserving jurisdiction.

[6] The sole exception we know of, and the only one cited by the Commission (ICC Report, p. 19), has been the Commission's refusal to impose conditions where **total abandonment** of a rail

employees involved, the distinction is of no small importance. Railroad conditions include four years of protective compensation for dismissed employees and displaced employees, as well as full compensation for loss involved in transferring or moving from one location to another. Motor carrier employees similarly situated are normally limited to three months severance pay for dismissed employees. The discrimination thus employed by the Commission is rank and startling.

The Commission, with the sanction of the court below, argues that Section 5 (2) (f) commands the granting of specific protections to railroad employees only, thus by implication giving the Commission discretion to give lesser protection to motor carrier employees. But one thought does not follow the other. Section 5 (2) (c) compels the Commission to give weight to "the interest of the carrier employees affected." This stricture applies equally to railroad and motor carrier employees. Section 5 (2) (f) requires that in any "transaction involving a carrier . . . by railroad . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." However, the Commission itself determined that it could hardly deny to motor carrier employees the application of the very same "fair and equitable" standard. In **Short Line, Inc.—Purchase—New England Transport Co.**, 75 M. C. C. 33, 37, it stated:

> "Although not set forth as a specific directive as in the case of railroad employees, the Act, taken as a whole, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers."

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line is proposed. In that situation, of course, there is no surviving corporation to pay benefits and no surviving employees to receive them. In this case, on the other hand, Overnite "survives" and its financial position (already healthy by any standard) improves by virtue of the transaction.

Indeed in **Hudson Bus Lines**, 58 M. C. C. 133, the Commission suggested that the parties use the **Oklahoma** and **Burlington** (railroad merger) cases, *supra*, as a guide in reaching an agreement with respect to the protection to be afforded the employees. Having itself interpreted the statute as requiring the application of the same standard to both groups of employees, it may not now be heard to deny it.

The Commission's argument is reminiscent of its position before the Court in **I. C. C. v. Railway L. Ex. Ass'n**, 315 U. S. 373 (1942), where it urged that the difference in language between two sections of the Act rendered it impotent to grant protective conditions for the benefit of employees in a railroad abandonment case. The Court responded as follows:

> "The Commission argues that the conditions it is authorized to impose under the consolidation section —'just and reasonable' which 'will promote the public interest'—are of much broader scope than the conditions it is authorized to impose under the abandonment section—conditions which 'the public convenience and necessity may require.' Although admitting that provisions for the protection of displaced employees may be a condition that 'will promote the public interest,' the Commission concludes that such provisions cannot be required by 'the public convenience and necessity.'
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> • • • • • • • •
>
> On the contrary, the Lowden Case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system. Such possible unstabilizing effects on the national railroad system are no smaller in the case of an abandonment like the one before us than in a consolidation

like that involved in the Lowden Case" (315 U. S. at 376-377).

The Court expressed its chagrin over a Commission interpretation which "requires us to impute to Congress a policy of mandatory protection for labor in unifications and no protection at all in abandonments" (315 U. S. at 379-380). Similarly here the unstabilizing effects on the transportation system of displacing labor with meager protection would be no smaller in the case of motor carriers than in the case of railroads. Further, as in the foregoing case, this Court should not impute to Congress an intent to effect unreasoned discrimination between two classes of employees similarly situated and affected under the Act.

The legislative history of the Act, while silent on the reason, if any, for the appearance of the word "railroad" in Section 5 (2) (f), is amply clear that Congress intended even-handed regulation of railroads and motor carriers. In fact the very reason for the enactment of the Motor Carrier Act (49 Stat. 543) in 1935 was to ease the burden on the railroads created by unfair competition from unregulated motor carriers—competition which in large part was permitted by differentials in wages and working conditions as between the regulated and unregulated industries.[7] As noted by this Court:

> "With the addition of motor and water carriage to its previous jurisdiction over rails, [the Commission] was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the National Transportation Policy, as declared by the later legislation. This . . . was de-

[7] Hearings on S. 1629, Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. 50, 51, 417, 423, 476, 542; S. Rep. No. 482, 74th Cong., 1st Sess. 3 (1935).

> signed to eliminate destructive competition not only within each form but also between or among the different forms of carriage."[8]

It takes no brilliant analysis to discern that the Commission's grant of much lesser protection to motor carrier employees than it grants to railroad employees is hardly conducive to the elimination of "destructive competition . . . among the different forms of carriage." Its interpretation of the Act, therefore, not only fails to comport with, but deals a severe blow to, the intention of Congress.

It is further worthy of note that in 1938, prior to the enactment of Section 5 (2) (f), the Commission granted to railroad employees protection similar to that which is now required by that section, and this under a standard which merely required the Commission to "promote the public interest." **Chicago, Rock Island & Gulf Railway Co. Trustees Lease**, 230 I. C. C. 181, aff'd sub nom. **United States v. Lowden**, 308 U. S. 225 (1939). Surely, therefore, Congress must have envisioned that similar protection would be accorded motor carrier employees under the more compelling and specific mandate of Section 5 (2) (c).

The court below was, therefore, in error in holding, with the Commission, that the latter's "policy . . . .to protect employees affected by financial transactions between motor carriers differently from employees where railroads are involved is . . . authorized by the statute" (App. A, p. 37). The statute, as so interpreted and applied would be constitutionally defective in that it invidiously and arbitrarily discriminates against the motor carrier class of employees. **Bolling v. Sharpe**, 347 U. S. 497 (1954); **United States v. Petrillo**, 332 U. S. 1 (1947); **Williamson v. Lee Optical Co.**, 348 U. S. 483 (1955); **Morey v. Doud**,

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[8] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. 194, 206.

354 U. S. 457 (1957); **Smith v. Cahoon**, 283 U. S. 553 (1931); **F. S. Royster Guano Co. v. Virginia**, 253 U. S. 412 (1920). The principle is well established, however, that when challenged constitutionally a statute will be interpreted in such a way, if possible, as will preserve its validity. **Greene v. McElroy**, 360 U. S. 474, 507, 508 (1959); **Kent v. Dulles**, 357 U. S. 116, 129 (1958). For this and other reasons above assigned Congress should not be presumed to have authorized the unequal and unfair treatment which characterizes the consistent course of Commission policy.

II.

The Commission Was in Error in Granting to Motor Carrier Employees Substantially Less Protection Than Normally Granted to Railroad Employees, Without Establishing a Factual Basis for Such Differentiation, Based on the Record Before It, or Otherwise Offering a Reasoned or Rational Explanation Therefor.

The Commission's stated and applied policy is to grant motor carrier employees substantially lesser benefits than it grants to railroad employees similarly situated. This policy squarely contradicts the intent of Congress. For rather than promote the elimination of competition among different classes of carriers, the policy defeats it. Moreover, the 4 year protection called for by Section 5 (2) (f) obviously defines and explains what is meant by "fair and equitable," a standard which the Commission itself has admitted to be applicable to motor carrier and railroad employees alike. **Short Line, Inc.—Purchase—New England Transport Co.**, 75 M. C. C. 33, 37.[9] What this suggests, at the least, is that in applying Section 5 (2) (c) the Commission was to utilize the protection specified in

[9] Indeed the court below referred to the "standard of fair and equitable protection" as one "which the Commission must grant to motor carrier employees" (App. A, p. 36).

Section 5 (2) (f) as a guide to what is "fair and equitable" for motor carrier employees, with the right to vary therefrom if the circumstances in a particular motor carrier case compelled, for good and sufficient reason, the imposition of lesser (or greater) conditions. Undeniably the Commission's policies must be "consistent with the statutory standards which govern its action" and, in their application to particular cases, must be "formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and [the Court] to understand, with a fair degree of assurance, why the Commission acts as it does."[10]

For these reasons the district court was correct when, in a prior case,[11] it held:

> ". . . we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of [the motor carrier], without a reasoned explanation of its denial . . ."

The Commission's sole attempt in that direction was its general and unsupported comparisons between the railroad and motor carrier industries, which may be paraphrased and categorized as follows:

1. The Commission stated that as compared with railroad employees, motor carrier employees are more readily absorbed into other types of work, other industries or the expanding motor carrier market and their skills are more adaptable. "Displaced rail employees, therefore, would encounter more difficulty in securing similar positions and,

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[10] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. 194, 211-212 (1943).

[11] **Amalgamated Ass'n v. United States**, 221 F. Supp. 958, 961.

consequently, need more protection from adverse effect than do motor carrier employees'' (App. C, p. 55).

These statements find no support in the record. No such evidence was offered or sought by the Commission. Nor does the Commission cite any supporting authorities or statistics. Moreover, the assertion is not addressed to this case. It may well be, were the facts known, that the motor carrier market in the geographical area involved here is contracting, or that the Rutherford employees have developed and been trained in particular skills not so adaptable to change or transferal, or that railroad employees similarly situated have greater freedom of movement in the market involved here. Finally, while labor market and skill mobility may have a bearing on severance pay protection, it will have little or no bearing upon seniority or moving-cost protections. In a word, the Commission issued a ''broad and conclusive declaration, in general terms, without supporting data or reasons, except as supplied by the policy itself,'' concerning ''a matter upon which the record factually throws no light.''[12]

2. The Commission stated that the ''majority'' of motor carriers are considerably smaller than the ''majority'' of railroads and ''as a rule'' motor carriers do not have substantial resources, are subject to greater competition, have high operating ratios, and ''generally do not have the capacity to absorb any substantial or long-term compensation awards.'' ''Imposition of protective conditions, in such instances, often would defeat or impede the transfer and possibly result in adverse effects to service under the operating rights and to the public'' (App. C, pp. 55-56).

Here again is an unsupported statement ''not limited to the particular competitive situation.''[13] What is worse,

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[12] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. at 202, 211.

[13] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. at 202.

it assumes the existence of conditions which are overwhelmingly **refuted** by the present record. Consider the following undisputed facts, as found by the Hearing Examiner and adopted by the Commission.[14]

> Vendee's balance sheet as of March 31, 1963, shows assets aggregating $10,829,239, consisting of: Current assets $2,588,503 principally cash $583,146, U. S. Treasury bills $295,464, deposit on utilities $100,017, accounts receivable $1,277,460, material and supplies $113,943, and prepayments $218,473; carrier-operating property, less depreciation, $7,478,059; intangible property $41,000; and other assets $721,677. Liabilities were: Current liabilities $2,339,451, including notes payable $3,425, accounts payable $889,208, accrued liabilities $449,047, taxes accrued $997,771; long term obligations, due within one year, $91,971; due after one year $2,989,682, reserve for deferred income tax $594,991; capital stock $1,010,353, premiums and assessments on capital stock $135,357, and earned surplus $3,667,434.
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> Its income statements for 1961, 1962, and the first five months of 1963, show operating revenues of $17,383,353, $19,469,819, and $8,404,875, net income, before provision for income taxes of $2,422,276, $3,203,997, and $1,368,418, and after such provision, $1,121,122, $1,558,247, and $637,054, respectively. Its operating ratios for the 1961, 1962, and the first five months of 1963, were 84.84, 82.73 and 84.53 (H. E. Report, p. 4).
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> Vendee maintains approximately 30 terminals and offices scattered throughout the territory which it serves. It operates 252 trucks, 448 tractors, 814

[14] In the following excerpts, Overnite is referred to as "Vendee", and Rutherford as "Vendor". The facts recited by the Hearing Examiner, as quoted here, were adopted by the Commission at ICC Report, pp. 2-3 (App. C, pp. 42-43).

trailers, and 66 service vehicles. It presently utilizes 17 more vehicles than at the time the instant application was filed. The stock of Overnite has been sold to members of the public since 1957, and recently has been listed on the New York Stock Exchange. (H. E. Report, p. 6).

Overnite's growth and improved financial standing as a result of the proposed transaction were shown as follows:

> Vendee believes that the unified rights can be used to its advantage from the standpoint of service and economy. Vendor's equipment can be improved considerably and savings can be effected through volume purchases, joint solicitation efforts, in claims adjustments, and through a reduction in administrative costs. Duplicate terminals would be consolidated at Richmond, Greensboro and Atlanta. It estimates that vendor's revenues of about $3,000,000 annually can be increased to $5,000,000 within three or four years and that there would a resulting increase in traffic transported under its own authority (H. E. Report, p. 6).
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> In addition, vendee has available a revolving credit of three and one-half million dollars, under a commitment with the First National City Bank of New York, N. Y.
>
> Giving effect to consummation of the proposed transaction as of February 28, 1963, vendee's balance sheet would have shown assets of $18,272,408, including current assets $2,109,152, as compared with current liabilities of $2,947,574. Capital assets would have been increased $1,013,572 and long-term debts increased by $583,400. Revenue equipment of vendor having a net book value of $347,617, has been appraised by independent appraisers at $538,100.

> The giving effect balance sheet reflects further an increase of $522,746 for intangibles as a result of this transaction. Vendee estimates that had it operated under vendor's rights in connection with its own, for the first two months of 1963, it would have increased its revenues by $418,765 to $3,608,071, and increased its net income before provisions for income taxes, by $48,848, and after such provisions, $21,973, as compared with vendee's actual income during the same period of $3,189,306, $539,941, and $242,973, respectively. On an annual basis its net income, after provisions for income taxes, would have been increased $131,838 annually. If these expectations were realized it would earn about 11 to 12 percent on the investment and would enable vendee to recoup the amount assignable to the operating rights of $522,746, in less than four years, as the result of income produced by the combined operating rights. The fixed charges resulting from the transaction would not be contrary to the public interest (H. E. Report, pp. 6 and 7).

In the face of these facts, the Commission's tame concession—"We recognize that vendee here is neither small nor unprofitable" (App. C, p. 56, fn. 2)—seems grossly understated. The facts affirmatively support the feasibility and desirability of imposing "railroad" protective conditions herein, by the Commission's own standard. Yet the facts were inexplicably ignored.

3. "In addition", said the ICC, "it is clear that if such unifications are not authorized, the result may be the demise of the weaker carriers as well as the loss of all of their employees" (App. C, p. 56). It is equally clear, we submit, that if such unifications are not authorized **in the railroad industry**, the same result would follow. In any event, there is no argument before this Court that such unifications should not be authorized—only that

such authorization should be conditioned upon fair and equitable protection for the employees involved, as required by the statute.

Neither the parties nor the courts should be bound to "sheer acceptance of the Commission's conclusion, in the form of its statement of the result and cryptic formulation of the policy on which it is rested."[15] It is hoped that a decision by this Court in the instant case

> ". . . will lead the Interstate Commerce Commission, despite its enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches even in that class of cases where Congress has relied on the Commissions's discretion in enforcing the most broadly expressed Congressional policy. Since the orders in such cases also fall under judicial scrutiny, it is desirable to insist upon precision in the findings and the reasons for the Commission's action."[16]

III.

Even Without Regard to Protections Normally Extended to Railroad Employees, the Commission Was in Error in Limiting the Protection Afforded in the Instant Case to Three-Months Severance Pay, Without Factual or Rational Support for Such Limitation.

The Commission's sole reference to the facts in this case was the following:

> "In view of such discretion, the question presented is whether, under the circumstances presented, the

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[15] **Eastern-Central M. C. Ass'n v. United States,** 321 U. S. at 209.

[16] **Schaffer Transportation Co. v. United States,** 355 U. S. 83, 95 (separate opinion by Frankfurter, J.).

> conditions proposed by the hearing examiner in this proceeding is just, reasonable, and adequate. We conclude that it is. It provides benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful without imposing such a burden on vendee as to imperil its financial stability or as to preclude consummation. Such condition, which we adopt as somewhat modified, is set forth in the findings herein (App. C, p. 56).

The ICC's approach is reminiscent of its error in **Schaffer Transportation Co. v. U. S.**, 355 U. S. 83, 90, where this Court said:

> "Rather than evaluate the benefit that Schaffer's proposed motor service might bring to the public, the Commission cast its first principal conclusion in terms of the adequacy of existing rail service, finding that service to be 'reasonably adequate'."

The proper question, of course, is not whether the Hearing Examiner's recommended relief was "adequate" but whether "the interest of the carrier employees affected" demanded more or different relief. It was clear that as a result of the Overnite-Rutherford merger, employees would be dismissed, employees would be displaced, and employees would suffer moving expenses. There is no evidence that, for dismissed employees, three months would be "a long enough period that aggressive job-hunting should be successful." There is no benefit whatever for displaced employees or those who would suffer moving expenses—and such protections were withheld for no reason which appears in the Commission's Report. Moreover, the Commission's concern that greater protections for the employees might "imperil" Overnite's "financial stability" or "preclude consummation" is wholly without factual support or justification. Quite to the contrary, as has been shown, the record demonstrates that

Overnite can well afford to pay substantial benefits.[17] "[T]he Commission's reason is insufficient justification for its action."[18]

At the very least, the appellants here, others similarly situated, and the general public, are entitled to a Commission explanation for the inconsistencies inherent in its own motor carrier decisions. In **Hudson Bus Lines**, 58 M. C. C. 133 (1951), the Commission suggested that the parties use the **Oklahoma** and **Burlington** cases as a guide in reaching an agreement with respect to the protection to be afforded the employees. Yet no such suggestion is proffered in the instant case. In **American Buslines**, 90 M. C. C. 173, 188, the ICC hedged its denial of protective conditions in the following terms:

> ". . . our findings should not be construed as opposing **in all instances** the imposition of conditions for the protection of motor carrier employees affected by transactions under section 5, similar to those in the Oklahoma formula and Burlington conditions . . ." (emphasis supplied).

Nevertheless, a careful reading of the ICC's opinion in the instant case fails to reveal why **this case** may not constitute one of those "instances" calling for the application of the **Oklahoma** or **Burlington** conditions.

In two recent motor carrier cases, the Commission has imposed conditions beyond the three-month severance provision, yet has failed to similarly act in this case. Thus, in **Midwest Buslines—Purchase (Portion)—American Bus Lines**, No. MC-F-7041,[19] the Commission added to the

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[17] Overnite itself was moved to characterize its business as "now-flourishing." Applicants' Reply to Protestants' Exceptions, p. 45.

[18] **American Trucking Ass'n v. United States**, 364 U. S. 1, 14 (1960).

[19] This is the ICC decision sustained by the court below in companion Case Nos. 644-65 and 684-65.

three-month severance condition a requirement of a lump sum payment approximately equal to the costs incurred by adversely affected employees in moving their households. Yet in the instant case we are given no reasoned explanation for the Commission's denial of the same condition. Similarly, in **Indiana Motor Bus Co.—Purchase—Chicago, South Shore and South Bend R. R.**, No. MC-F-8122 (1963), the Commission added to the severance allowance a three-month displacement allowance. But, again, in the instant case we are offered no rationale for its denial.

CONCLUSION.

"The problem is novel . . . the matter is one of general importance . . . It may touch vitally the public interest. It involves, to some extent, the important task of reconciling previously established railroad policies with, or adapting them to, the requirements of the presently effective National Transportation Policy and its application to a coordinated transportation system."[20] Therefore, jurisdiction should be noted and the case reversed and remanded for disposition consistent with the opinion of this Court.

DAVID PREVIANT,
511 Warner Building,
Milwaukee 3, Wisconsin,

HERBERT S. THATCHER,
DAVID S. BARR,
1009 Tower Building,
Washington 5, D. C.

[20] **Eastern-Central M. C. Ass'n v. United States**, 321 U. S. 194, 209-210 (1943).

APPENDIX.

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APPENDIX A.

(Filed Apr. 20, 1966.)

United States District Court for the District of Columbia.

American Buslines, Inc., Plaintiff,
v.
United States of America and Interstate Commerce Commission, Defendants.

Civil Action. No. 644-65.

Amalgamated Transit Union, AFL-CIO, Plaintiff,
v.
United Stafes of America and Interstate Commerce Commission, Defendants.

Civil Action. No. 684-65.

American Buslines, Inc., National Association of Motor Bus Owners, Intervening Defendants.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local Union 549, Plaintiffs,
v.
United States of America and Interstate Commerce Commission, Defendants,

Civil Action. No. 894-65.

Overnite Transportation Company and Rutherford Freight Lines, Inc., Intervening Defendants.

Opinion.

James E. Wilson, Warren Woods, and Jon F. Hollengreen, of Washington, D. C., for the Plaintiff in C. A.

644-65 and for Intervening Defendant, American Buslines, Inc., in C. A. 684-65.

I. J. Gromfine and William B. Peer, of Washington, D. C., for the Plaintiff in C. A. 684-65.

Herbert S. Thatcher and David S. Barr, of Washington, D. C., for the Plaintiffs in C. A. 894-65.

William H. Orrick, Jr., Assistant Attorney General of the United States, and John H. D. Wigger, Department of Justice; David G. Bress, United States Attorney; Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, of Washington, D. C., for Defendants.

Robert J. Corber, of Washington, D. C., for Intervening Defendant, National Association of Motor Bus Owners, in C. A. 684-65.

J. W. Alexander, Jr., of Charlotte, North Carolina, and W. T. Croft, of Washington, D. C., for Intervening Defendants, Overnite Transportation Company and Rutherford Freight Lines, Inc., in C. A. 894-65.

Before Burger, United States Circuit Judge, and McGuire and Curran, United States District Judges.

Curran, J.: Two of these consolidated civil actions involve attacks by two labor unions upon orders of the Interstate Commerce Commission in **Midwest Buslines, Inc.—Purchase (Portion)—American Buslines, Inc.**, 97 M. C. C. 426, and in **Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.**, 97 M. C. C. 568, on the grounds that the Commission gave too little financial protection to adversely affected employees in certain financial transactions between motor carriers. The third action, filed by American Buslines, Inc., seeks to set aside the order entered in the **Midwest** case for the alleged reason that the Commission gave too much protection to the

affected employees. These three actions are filed pursuant to 28 U. S. C., §§ 1336, 1398, 2284, and 2321-2325.

This is the second time that the **Midwest** case is before the Court, as neither the union nor the buslines company was satisfied with the order of the Commission on the remand. The **Overnite** case was filed by the Teamsters Union and is an attempt to reargue the legal issues presented in the first appeal of the **Amalgamated** case. In that case, the Commission approved the purchase of two of the American Buslines routes by Midwest Buslines and reserved jurisdiction for three years to entertain any employee petitions regarding needed financial protection from a possible adverse effect of the transaction. The purchase was completed December 31, 1959. On September 20, 1960, the Commission granted Amalgamated's petition to reopen the proceeding, allowing it to show "specifically how, and to what extent, particular employees of the carriers concerned have been adversely affected". The Commission declined to impose any conditions on behalf of the employees in the reopened proceeding.

This Court set aside the order of the Commission, stating it "need not attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc.," and "that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a reasoned explanation of its denial, consistent with what has here been said." On the remand of the **Amalgamated** case, the Commission reopened its proceedings but stated that it was "for consideration on the record as made".

In August, 1964, the Commission issued its report on reconsideration. It conditioned its order upon payment by American of a "lump sum settlement" to certain of

the employees to cover "loss of pay while moving, temporary maintenance of two households, and the excess of rents and utilities costs paid for a period of one year after the date of such reassignment". The Commission also provided compulsory arbitration if there was any disagreement over this protection that might arise between the bus company and the union. In February, 1965, the Commission denied a petition for a reconsideration. Both Amalgamated, in Civil Action No. 684-65, and American Buslines, in Civil Action No. 644-65, attack this order.

In the **Overnite** proceedings, the Commission approved the purchase by Overnite of Rutherford Freight Lines, "in view of vendor's declining traffic and revenues and the resulting trend toward substantial deficits which, if continued, will result only in its demise as a carrier". The Commission rejected the argument of the Teamsters Union that the transaction be denied on the grounds that Overnite was a non-union motor carrier and approved the transaction, subject to the customary protection in motor carrier cases of three months' severance pay payable to the adversely affected employees, which it found to be just, reasonable and adequate protection.

The following statutes are involved:

Section 5 (2) (c) of the Interstate Commerce Act, 49 U. S. C., § 5 (2) (c)—In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5 (2) (f) of the Act, 49 U. S. C., § 5 (2) (f)—As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The defendants, The United States of America and the Interstate Commerce Commission, suggest that the questions raised by these three consolidated cases are as follows:

1. Does the Commission policy to protect motor carrier and railroad employees differently have a rational basis and warrant in the statute?

2. Is the protection granted the motor carrier employees in the two purchase transactions before the Court fair and equitable both to the employees and the involved motor carriers?

3. Does the Commission have statutory authority to require compulsory arbitration of disputes over the protection it affords employees as a condition to its approving a transaction under Section 5 of the Act?

We agree.

Motor carrier employees do not need very much financial protection from the adverse effects of Section 5 transactions, for they move in an expanding industry and possess quite a degree of transferability within the industry itself. We also agree with the Commission that "the skills of motor carrier employees are more adaptible (sic) than the more technical and limited skills of most railroad employees". Displaced railroad employees meet with more difficulties in obtaining similar positions and, therefore, they need more protection than do motor carrier employees.

The standard of fair and equitable protection which the Commission must grant to motor carrier employees will not be found in the standard established for railroad employees. While Section 5 (2) (f) of the Act requires certain minimum financial protection over a period of four years to railroad employees, no such requirement has ever been enacted by the Congress for motor carrier employees. In the railroad cases, the minimum protection is prescribed by the statute, and discretion is given only to increase such protection, while in the motor carrier cases, no minimum is prescribed by the statute, for the statute only grants a discretion to award protection to motor carrier employees that is fair and equitable.

The Commission was not required to follow the mandate of the Congress regarding the minimum protection granted railroad employees as a guide to the minimum protection for motor carrier employees. We cannot say that, under the circumstances of these cases, the motor carriers' employees involved are so similarly situated to railroad employees as to entitle them to more protection than the Commission has awarded them.

We hold, therefore, that the policy of the Interstate Commerce Commission to protect employees affected by financial transactions between motor carriers differently from employees where railroads are involved is supported by a rational basis and is authorized by the statute.

In the **Midwest Buslines** case, the employees are protected from the adverse effects which resulted from the transaction, while in **Overnite**, the protection extends to employees in a transition from one job to another in the motor carrier industry. In **Overnite**, the Commission found that three months' severance pay would provide "benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful". It found, further, that three months pay would not impose "such a burden on vendee as to imperil its financial stability or as to preclude consummation".

The only financial loss to employees that the Commission could here attribute to the Midwest Buslines occurred with its employees who were required to change their place of residence following the strike. Congress has prescribed no minimum statutory criteria for motor carrier employees, for the only standard is whether the particular protection of each case is fair and equitable in the circumstances. The majority of the Commission has granted only such protection as the employees would have been entitled to had they followed their work, and such protection seems fair and equitable to employees of American Buslines.

We hold, therefore, that the protection given to motor employees of the two proceedings before the Court is fair and equitable to both the employees and the involved motor carriers.

In Civil Action No. 644-65, American Buslines take the position that the Commission has no authority to direct that disagreements over the amount of a particular lump-

sum settlement be submitted to binding arbitration. This argument has no legal efficacy for the Commission's power to require binding arbitration has previously been sustained. See **New Orleans and Northeastern Railroad Co. v. Bozeman,** 312 F. 2d 264 (5th Cir. 1963). The subject of arbitration will not be any labor-management matter, nor, as this Court has already decided, any matter foreclosed by the strike settlement agreement. The Commission requires only that disputes over the exact amount of lump-sum payments due particular individuals be submitted to an arbiter.

We hold, therefore, that the Commission may lawfully require compulsory arbitration of disputes over the protection granted employees as a condition to its approving a transaction under Section 5.

The three consolidated actions are dismissed and the two decisions of the Interstate Commerce Commission are sustained. This opinion constitutes the findings of fact and the conclusions of law, and counsel for the United States and the Interstate Commerce Commission shall submit an appropriate order not inconsistent with this opinion.

APPENDIX B.

United States District Court for the District of Columbia.

American Buslines, Inc., Plaintiffs, v. United States of America and Interstate Commerce Commission, Defendants.	Civil Action. No. 644-65.
Amalgamated Transit Union, AFL-CIO, Plaintiff, v. United States of America and Interstate Commerce Commission, Defendants, American Buslines, Inc., National Association of Motor Bus Owners, Intervening Defendants.	Civil Action. No. 684-65.
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local Union 549, Plaintiffs, v. United States of America and Interstate Commerce Commission, Defendants, Overnite Transportation Company and Rutherford Freight Lines, Inc., Intervening Defendants.	Civil Action. No. 894-65.

Judgment.

This Court, having been duly constituted as a Three-Judge Statutory Court pursuant to 28 U. S. C., §§ 1336, 1398, 2284, 2321-2325, and having heard the parties on

brief and in oral argument and having entered its opinion of April 20, 1966, in these actions,

Orders, That the reports and orders of the Interstate Commerce Commission of which complaints are made in the above-entitled actions are hereby sustained, and that each of the above-entitled actions be, and they are hereby, dismissed.

This the 4th day of May, 1966.

/s/ .....
United States Circuit Judge.

/s/ .....
United States District Judge.

/s/ .....
United States District Judge.

APPENDIX C.

MF-2895

INTERSTATE COMMERCE COMMISSION.

No. MC-F-8393

OVERNITE TRANSPORTATION CO.—PURCHASE—
RUTHERFORD FREIGHT LINES, INC.

No. MC-F-8393[1]

OVERNITE TRANSPORTATION CO.—PURCHASE—
RUTHERFORD FREIGHT LINES, INC.

Decided July 31, 1964.

1. In No. MC-F-8393, purchase by Overnite Transportation Company of the operating rights and property of Rutherford Freight Lines, Inc., and acquisition by J. Harwood Cochrane of control of the operating rights and property through the purchase, approved and authorized, subject to conditions.

2. In Finance Docket No. 22555, authority granted Overnite Transportation Company to issue promissory notes in the aggregate principal amount of not to exceed $575,000.

William T. Croft and J. W. Alexander, Jr., for applicants.

Allen Post, Bates Block, Herbert S. Thatcher, and Hugh J. Beins, for protestants.

Report of the Commission,
Division 3, Commissioners Tuggle, Murphy, and Walrath.

Tuggle, Commissioner:

Exceptions to the report and recommended order by the examiner were filed jointly by International Brother-

[1] This report also embraces Finance Docket No. 22555, Overnite Transportation Company—Notes.

hood of Teamsters and Teamsters Local No. 549, hereinafter referred to as Union, and jointly by Georgia Highway Express, Inc., and B. C. Truck Lines, Inc., affiliated carriers hereinafter called Express and B. C., respectively, and applicants replied. A request for oral argument contained in Union's exceptions was denied by order of the Commission, Commissioner Tuggle, dated February 26, 1964.

Overnite Transportation Company, of Richmond, Va., and Rutherford Freight Lines, Inc., of Bristol, Va., by a joint application filed March 21, 1963, seek authority under section 5 of the Interstate Commerce Act for the purchase by the former of the operating rights and property of the latter and of two terminals owned by Roanoke Truck Depot, Inc., a non-carrier affiliate of vendor, hereinafter called Roanoke, for a base consideration of $1,250,000. J. Harwood Cochrane, also of Richmond, who controls vendee through management and ownership of 24.02 percent of its outstanding common capital stock, seeks authority under the same section to acquire control of the operating rights and property through the purchase transaction. Applicants operate in excess of 20 motor vehicles in interstate or foreign commerce.

By a separate application, filed April 8, 1963, vendee seeks authority under Section 214 of the act to issue three non-interest-bearing promissory notes in the aggregate principal amount not exceeding $575,000 to finance, in part, the proposed purchase transaction. No representation in respect thereto has been made by any State authority.

Hearing in the two proceedings has been held on a consolidated record at which they were opposed by the previously named protestants who introduced evidence. Briefs have been filed. Facts concerning the operations of applicants, their financial data, the terms and condi-

tions of the proposed transaction, and the operations of protestants are adequately set forth in the report of the examiner, are adopted as our own, and will be restated herein only to the extent found necessary for clarity.

Vendee and vendor are motor common carriers in interstate or foreign commerce, over regular and irregular routes, primarily of general commodities, with exceptions. Vendee's operations are over a network of regular routes extending generally from Richmond and Lynchburg, Va., on the north, to Atlanta and Savannah, Ga., on the south, and over irregular routes in an area embracing southern Virginia, eastern Tennessee, northwestern Georgia, western and central North Carolina, and all of South Carolina. Vendor's operations are over a network of regular routes extending from Richmond to Big Gap, Va., Bluefield, W. Va., Chattanooga, Tenn., Atlanta, and Greensboro, Raleigh, Erwin, and Charlotte, N. C. It also holds intrastate authority in Virginia and Tennessee. The routes of vendor are generally west of and complementary to those of vendee although some duplications do exist, for example, between Danville and Lynchburg, Va., over U. S. Highway 29, between Winston-Salem, N. C., and Monterey, Va., over U. S. Highway 52, and over U. S. Highway 70 between Greensboro and Burlington, N. C. Vendee would have no objection to elimination of route duplications in event the transaction is approved.

Under the Section 5 transaction vendee would acquire vendor's rights and properties, with certain exceptions as to the latter, for a consideration of $850,000, subject to adjustment upward or downward as certain notes may have been prepaid, plus an amount equal to vendor's liabilities less capital stock, surplus, and assets retained by vendor as of the date of consummation. Vendee also proposed to acquire two terminals of Roanoke for $400,000, and to employ two executives of vendor for 3 years at $15,000 per annum each. As of May 31, 1963, the ad-

justed purchase price would have been $1,826,922, of which $1,326,922 would have represented cash disbursements and $500,000 would have represented the aggregate of 3 non-interest-bearing notes, each payable in 72 monthly installments. Vendee should have little difficulty in meeting such obligations; however, our approval is conditioned that the total price shall not exceed $1,826,922, because of the possible inflation of vendor's liabilities which might be inversely proportional to its true net worth.

The examiner recommended that the applications be granted. He found that vendor has actively operated under its authority but that operating problems had arisen because of its deteriorating financial conditions; that it had operating losses of $94,000 in the first 5 months of 1963, its truckload traffic had decreased 30 percent over the same period in 1962, and efforts of its management to arrest the downward trend of its operations had been unsuccessful; and that the president of vendor was fearful it would become insolvent if the instant transaction were not approved. The examiner further found that vendee was a successful operator, with net income, after provision for income taxes, of $1,121,122, $1,558,247, and $637,054, for 1961, 1962, and the first 5 months of 1963; that vendee believed the unified rights could be used to advantage from the standpoint of service and economy; that vendor's equipment could be substantially improved, and savings could be effected through volume purchases, joint solicitation, in claims and adjustments, and reduced administrative costs; and that vendee estimated that operations under the combined rights would result in increase in annual net income of $131,838, or earnings on its investment of 11 to 12 percent. In respect to protestants, the examiner found that the unification might result in some traffic adjustment in the area served by the unified operations but that the record as a whole did not show that protestants would be adversely affected to

any material extent. In respect to employees, the examiner found that the transaction would result in the displacement of some 92 of the 224 employees of vendor, and that specific provisions should be imposed for their protection, citing, in support thereof, **Short Line, Inc.—Purchase—New England Transp. Co.**, 75 M. C. C. 33, and **Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.**, 75 M. C. C. 147. Pursuant thereto, he imposed a condition providing that any employee of vendor displaced by the transaction should receive, for a period not exceeding 3 months, severance pay at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, reduced by the amount of other compensation or wages received from other sources during the 3-month period.

In their exceptions, the protestant motor carriers assert that the examiner erred in failing to find that the authority of vendor at intermediate points on the regular routes between Atlanta and Knoxville, via Chattanooga, was dormant, and that such intermediate-points authority should be canceled as a condition to approval of the application. Protestants contend that the evidence of record clearly reveals that the service performed by vendor at such points was limited to a few volume movements with other service rendered only via interchange with other carriers. They assert that traffic at such intermediate points is vital to Express and that this carrier would be adversely affected if the transaction were approved and vendee permitted to institute an aggressive operation at such points.

In its exceptions Union argues that the principal issues presented by the proceedings are (1) whether the applications should be denied because the public interest would not be served by permitting an applicant such as vendee, with an alleged anti-union record, to acquire an already unionized operation, or (2) whether, in the alternative,

if the applications were granted, specific conditions should be imposed to protect the job rights and job interests of the employees of vendor, and what form such conditions should take. It argues that the examiner erred in rejecting evidence respecting vendee's anti-labor record as reflected in various proceedings before the National Labor Relations Board (NLRB); in failing to find that the adversely affected employees of vendor were entitled to protective provisions similar to those afforded railroad employees under identical circumstances; in failing to find that the employees of vendor, particularly those at the terminals at Bristol and Roanoke, Va., were desirous of retaining their union representation; and in not requiring vendee to recognize both the union and the terms of the existing collective agreement to which Union is a party at the indicated terminals.

Union contends that the transaction should be denied or more adequate conditions imposed for the protection of adversely affected employees; that the inevitability of interruptions to operations because of labor strife is a factor which this Commission has regarded as significant in deciding applications; that, even if vendor is forced out of business because of deficit operations, there is no showing that the public will be inconvenienced thereby; that, if necessary to permit vendor to remain in business and as an alternative which the employees of vendor are willing to accept, Union is willing to negotiate with vendor respecting a reduction in labor costs. Union states that, while Section 5 (2) (c) of the act is not as specific as Section 5 (2) (f) respecting railroad employees, the Commission in the **Short Line** case, previously cited, stated that "public policy demands fair and equitable treatment of employees of motor carriers"; that in **Amalgamated Assn. of Street, Elec. Ry v. United States**, 221 F. Supp. 958 (1963), hereinafter called the **American Buslines** case, the Court stated that failure to accord motor carrier employees the same protection as railroad em-

ployees in similar situations should not occur without a reasoned explanation, which has not been done in this case; and that because vendee has indicated it does not propose to effect any changes in the duties of the drivers and the supervisory personnel at Bristol and Roanoke, and because the employer acquired is unionized, under principles of labor law and vendor's contract with Union, the acquiring carrier is obliged to recognize the union and the existing collective bargaining agreement.

In reply to the exceptions of the motor carrier protestants, applicants contend that a carrier is not required to submit evidence of operations to and from every point on its authorized routes in order to show continuous and substantial operations, citing, among others, **Mid-Continent Frt. Lines, Inc.—Purchase—Hanson M. Exp.**, 65 M. C. C. 312, and **Frank Cosgrove Transp. Co., Inc.—Pur.—Dawne Transp. Co.**, 80 M. C. C. 191; that the contention of protestants that the evidence of applicants shows only 69 shipments to and from the intermediate points on the routes between Atlanta, Chattanooga, and Knoxville is erroneous, as the evidence discloses the transportation of 93 shipments which moved to and from such points in a 6-day period, of which vendor originated 6 and delivered 9; that other evidence indicates that in the last 6 months of 1962 vendor delivered 74 shipments to 11 intermediate points on such routes; and that the mere fact that vendor on occasions found it more economical and expedient to turn shipments over to other carriers for delivery does not warrant a finding that the rights involved are dormant.

In reply to the exceptions of Union, applicants contend that disapproval of the applications herein, not only would result in financial disaster for vendor and loss of service to the public but loss of employment to all employees of vendor; that Union evidently would prefer to sacrifice the jobs of all employees of vendor rather than see vendee, a non-union carrier, expand its operations;

that the legislative history of Sections 5 (2) (c) and 5 (2) (f) clearly indicates the intent to give railroad employees greater protection than that afforded employees of motor carriers, any protection afforded motor carrier employees being discretionary with the Commission; that motor carriers, being smaller than rail carriers, are financially unable to pay equivalent protective costs; that rail employees, as a rule, are highly specialized, unlike employees of motor carriers; and that, considering all circumstances, including the fact that the conditions imposed by the examiner will cost in excess of $100,000, the affected employees of vendor will be adequately protected and the imposition of further conditions could imperil consummation. Applicants will accept the examiner's proposed conditions.

Applicants represent that offers of employment by vendee to employees of vendor will be made on the basis of seniority, that vendor's employees will be treated as if their service had been with vendee, that reasonable moving expense allowances will be made for those employees transferred to other locations, that the length of service of the employees of vendor with that carrier will count toward their starting pay with vendee, that ages of employees will not be considered as a cause for rejection, that vendee will attempt to persuade its insurance company to allow the selected employees of vendor to enjoy hospital, medical, and life insurance benefits without the usual 30-day waiting period, that vendee does not "lay-off" full-time employees for lack of work and reduction in the work force during slack periods would be based on attrition, and that in matters relating to advancement, demotion, layoff recalls, and the filling of vacancies, vendee first will consider the qualifications of the applicants and, other things being equal, seniority will control. Vendee, however, does not commit itself to "bump" any of its existing employees for more senior employees of vendor. It further contends that payment

of severance pay should not be required for those former employees of vendor who are already in a "lay-off" status and are merely retained on the rolls of vendor due to its agreement with Union, and asserts that the transaction should be approved subject to the condition that only these employees of vendor who are separated or displaced as a direct result of the transaction are entitled to protection.

In respect to the contention that vendee should be required to conform to the collective bargaining agreement now existing between Union and vendor, vendee asserts that the question is not before the Commission of whether it should recognize Union as representative of future employees in a legally established and appropriate bargaining unit; that the question of whether vendee, as a successor company to vendor, should be required to recognize and bargain with Union is reserved to the NLRB; that none of the cases cited by Union supports a requirement of assumption of union contracts nor has any case been found where a Federal Court or Agency has held that a bona fide purchaser of assets is bound by a union contract of vendor; and that the cases that do deal with this subject are contrary to the contentions of Union.

Discussion and Conclusions.

As previously stated, the motor carrier protestants contend that rights of vendor at the intermediate points between Atlanta and Knoxville, via Chattanooga, should be canceled for dormancy. In this respect, the evidence indicates that vendor's service between the three main points has consisted of at least one round trip daily in each direction, and that additional schedules, including peddle runs, have been added on occasions. Vendor asserts that it has actively solicited traffic for movement to and from all points located on the said route, and points out that some of its difficulty has been due to the fact that with the exception of Cleveland, Tenn., it holds

only interstate authority over the route between Knoxville and Atlanta. The principal points on such route, and their population as shown in the 1963 Rand-McNally Road Atlas, other than the three main points, are, in Tennessee, Lenoir City (4,979), Loudon (3,812), Sweetwater (4,145), Athens (12,102), and Cleveland (16,196), and, in Georgia, Dalton (17,868), Calhoun (3,587), Cartersville (8,668), and Marietta (25,565). In respect to the transportation performed to and from such points, the evidence discloses that between July 1 and December 31, 1962, vendor delivered some 76 shipments at such intermediate points, with service performed at all points except Marietta. No outbound shipments are shown, vendor asserting that they would be difficult to ascertain because of the method used in maintaining its records but that they would approximate 25 percent of the inbound shipments.

While it is clear that vendor's activity at the said intermediate points has been substantially less active than at other points it is authorized to serve, it is our opinion that the service performed, although limited, is sufficient to warrant a finding that the intermediate-point rights are not dormant. Vendee probably will be more aggressive in seeking business at the intermediate points if the application is approved. However, the evidence will not support a finding that this foreseeable increase in competition will be sufficient to affect detrimentally the operations of the protestant carriers. Perhaps Express may lose some traffic, as indicated by the examiner, and this often occurs where a stronger and more aggressive carrier takes over the operations of a less stable carrier, as here, but this factor is not sufficient by itself to justify a finding that the application should be denied, that service at the intermediate points should be canceled, or that some restriction should be placed upon the service vendee can render at such points under the unification. Compare **Consolidated Copperstate Lines—Pur.—Sunset M.**

Lines, 85 M. C. C. 113. Any restriction on the authority, precluding service at the intermediate points, or any cancellation of authority at such points, would create unnecessary operating problems and would not be in the public interest.

In respect to applications filed under Section 5 (2) of the act, "the interest of the carrier employees" is only one of the matter we consider in determining whether approval of an application would be consistent with the public interest. In administering the provisions of 5 (2), we are guided also by consideration of the adequacy of transportation service, of its essential conditions of economy and efficiency, and of appropriate and best use of transportation facilities. The public interest is paramount in considering applications filed under such section, with "public" referring to all persons affected by carrier operations and not to one group of such persons to the exclusion of others.

In our opinion, a finding that the public interest would not be served by permitting vendee, a non-union carrier, to acquire the operations and facilities of vendor, a unionized carrier, because vendee may have participated in some anti-union activity in the past, and is thereby "unfit," even if such activity were proven, would not be justified. The facts that efforts to unionize vendee may have been unsuccessful, that it proposes to retain its non-union status, and that it here seeks to acquire a unionized carrier are no bases for finding that the public interest would be adversely affected, that vendee's employees have been adversely affected in the past, or that approval of the application would result in future adverse effect upon its employees.

On the other hand, were we persuaded this transaction was repugnant to the national labor policy, we would be hesitant to approve it. We have, however, considered the allegations of the union in this regard and viewing

the matter in a light most favorable to it, have considered the material presented in its offer of proof, yet conclude these facts do not bar our approval of this application.

The contention that approval of the application may lead to labor difficulties and disruption of vendee's operations as well as further violations of the national labor policy is conjectural. In any event, vendee cannot guarantee labor peace even if it were to recognize the union. Furthermore, such possibility does not warrant withholding approval of the application when it otherwise appears that the public would benefit and that it would foster the appropriate and efficient use of the transportation facilities involved. The further contention of Union that if the application should be approved vendee should be required to recognize and conform to the collective bargaining agreement between vendor and Union at the two terminals sought to be acquired from Roanoke, and that, inasmuch as the agreement contained a successor clause and vendee had knowledge thereof, it is bound thereby, is not a matter for our determination. Compare **Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.**, 70 M. C. C. 169, 75 M. C. C. 147, and 87 M. C. C. 235. In his report, the examiner concluded that the Commission should make no finding or recommendation with respect to the labor relations problems, citing, in support thereof, **Burlington Truck Lines v. United States**, 371 U. S. 156 (1962), the same case cited by Union in support of its contention that accommodation to the national labor policy by the Commission requires denial of the application. As stated by the Supreme Court in that proceeding, in reference to the Commission and the NLRB (page 173), "If either agency is not careful it may trench upon the other's jurisdiction, and because of lack of expert competence, contravene the national policy as to transportation or labor relations." We concur in the conclusion of the examiner.

In any event, in view of vendor's declining traffic and revenues and the resulting trend toward substantial deficits which, if continued, will result only in its demise as a carrier, we cannot determine how denial of the instant application could be considered to be consistent with the overall public interest, including that of all of vendor's employees. We believe it would be imprudent to give any weight to Union's offer that, if necessary to permit vendor to stay in business, it is prepared to negotiate the lessening of its labor costs. No explanation is submitted as to how the necessary reduction could be accomplished, how this would alleviate vendor's financial condition or restore its declining traffic and revenues, or why, if Union were aware of these problems, it was not attempted prior to commencement of the instant proceeding. Though it is somewhat conjectural, considering the carrier's operating losses in the first 5 months of 1962, any labor-costs reduction permitting vendor to continue in business presumably would require the lowering of the existing wage scale or the elimination of the jobs of some employees. Such savings also must be based on the premise that vendor's present level of operating efficiency can be maintained or improved. There is no showing that both could be accomplished.

Under subparagraphs (c) and (f) of paragraph (2) of Section 5 of the act, it is provided, as pertinent, that:

> (c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: * * * (4) the interest of the carrier employees affected.
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> (f) As a condition to its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the rail-

> **road** employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by **railroad** affected by such order being in a worse position with respect to their employment, * * * [Emphasis supplied].

Although Congress, in compelling us to consider "the interest of carrier employees affected" in Section 5 (2) (c), may well have had in mind such factors as protective conditions for employees of motor carriers, an analysis of the legislative history as well as the explicit language of Section 5 (2) (f) above, clearly shows that the Congressional mandate for the imposition of protective conditions for employees, particularly the 4-year provisions, applies only to employees of rail carriers affected by a transaction, and that the amount of protection which must be afforded employees of motor carriers, if any, pursuant to the provisions of Section 5 (2) (c) above, is not subject to any fixed formula and must be based on the circumstances existing in any particular case. Compare **Short Line, Inc.—Purchase—New England Transp. Co.**, *supra*, and **Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.**, *supra*.

Regarding Commission decisions pertaining to motor carrier employees, the Commission in the **Short Line** case, *supra*, did state that "* * * the Act, taken as a whole, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers. * * *." On the other hand, contrary to the contention of Union, the Commission in that case did not establish any principle to the effect that motor carrier employees should be afforded the same protection that is accorded the employees of railroads. In the **American Buslines** case, the District Court also did not indicate that the Commission was bound to apply the mandatory

provisions of Section 5 (2) (f) of the act to motor carrier employees, stating, in its decision, that "We need not here attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc." and further "But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a reasoned explanation of its denial, * * *."

In the first place, as previously noted, the law does not require that provisions for the protection of motor carrier employees be imposed. In addition, the skills of motor carrier employees are more adaptable than the more technical and limited skills of most railroad employees. Motor carrier maintenance employees are more readily absorbed into maintenance work in garages and similar establishments, truck drivers are employable in numerous industries in addition to motor carrier operations, and clerical workers are readily absorbed into industry. Even employees with more technical skills are more readily absorbed into the expanding trucking, bus, and public automobile businesses. The rail transportation industry, on the other hand, is unique in that it generally has a full complement of employees with very few openings for new employees. The trend toward fewer operating rail employees is one of public knowledge. Displaced rail employees, therefore, would encounter more difficulty in securing similar positions and consequently, need more protection from adverse effect than do motor carrier employees.

The majority of the approximately 18,500 motor carriers regulated by this Commission are considerably smaller than a majority of the railroads. The motor carriers, as a rule, do not have substantial resources, are subject to greater competition, have high operating ratios, and generally do

not have the capacity to absorb any substantial or long-term compensation awards.[2] Many motor carriers dispose of their rights and properties only because they are financially unable to continue their service to the public. Imposition of protective conditions, in such instances, often would defeat or impede the transfer and possibly result in adverse effects to service under the operating rights and to the public. In addition, it is clear that if such unifications are not authorized, the result may be the demise of the weaker carriers as well as the loss of all jobs of their employees. The question then is one of what is fairest, considering both employee and carrier interests. It should be noted that even in rail proceedings, where total abandonment of the rail lines is proposed, the Commission usually has not imposed conditions for the protection of employees affected by the abandonment. See **Rutland Ry. Corp. Abandonment of Entire Line**, 317 I. C. C. 393, affirmed in **Brotherhood of Locomotive Engineers v. United States**, 217 F. Supp. 98 (1963).

In our opinion, it is clear that if Congress intended that employees of motor carriers be afforded the same protection as that afforded employees of railroads, under transactions such as involved herein, it would not have made the provisions of section 5 (2) (f) mandatory and the provisions of section 5 (2) (c) discretionary with the Commission. In view of such discretion, the question presented is whether, under the circumstances presented, the condition proposed by the hearing examiner in this proceeding is just, reasonable, and adequate. We conclude that it is. It provides benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful without imposing such a burden on vendee as to imperil its financial stability or as to preclude consummation. Such condition, which we adopt as somewhat modified, is set forth in the findings herein.

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[2] We recognize that vendee here is neither small nor unprofitable.

Inasmuch as some of the employees of vendee may be dismissed to make room for employees of vendor that may be employed by vendee, the condition imposed will be considered as applying to the current employees of both carriers. Any person previously employed by either carrier and in a layoff status on the date of service of the order herein, and who has been in such status for a period of at least 6 months prior thereto, shall not be deemed to be an employee of either carrier on such date and thereby is not entitled to the benefits of the protective condition. Our findings also will provide for arbitration of any dispute or controversy respecting the application of the protective condition.

In No. MC-F-8393, we find that the purchase by Overnite Transportation Company of the operating rights and property of Rutherford Freight Lines, Inc., and acquisition by J. Harwood Cochrane of control of the operating rights and property through the purchase, upon the terms and conditions set forth herein and in the report of the examiner, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5 (2) (a) and will be consistent with the public interest, and that, if the authority herein granted is exercised, Overnite Transportation Company will be entitled to operate under the rights granted in Nos. MC-60875 and MC-60875 (Sub-Nos. 1, 3, 4, 9, 11, 12, 13, 14, and 16), which rights are herein authorized to be unified with rights otherwise confirmed in Overnite Transportation Company, and to be embraced in a certificate to be issued in its name, with duplications eliminated; provided, however, that the transaction herein authorized shall be subject to the following condition:

Any employee of Rutherford Freight Lines, Inc., or Overnite Transportation Company, separated from his employment with either carrier as a result of, or in anticipation of, consummation of the transaction

herein, shall receive, for a period of not more than 3 months, severance pay, paid by Overnite Transportation Company, at the rate of his average monthly pay for the 12 months immediately preceding the month in which he was discharged, said payments to be reduced by the amount of the total wages earned during the period in which he otherwise was employed during the 3 months, including any unemployment benefit payments. In the event of any dispute or controversy arising with respect to the protection afforded by said condition, which cannot be settled by Overnite Transportation Co., and the employee, or his authorized representative, within 30 days after the controversy arises, may be referred by either party to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedures, expenses, et cetera, to be agreed upon by the carrier and the employee, or his duly authorized representative.

In Finance Docket No. 22555, we find that the issuance by Overnite Transportation Company of three non-interest-bearing promissory notes, each payable in 72 equal consecutive monthly installments from the date of consummation, (1) to Rutherford Freight Lines, Inc., in a principal amount not to exceed $250,000, (2) to Decatur Cartage Company, in a principal amount not to exceed $125,000, and (3) to Texas Leasing Company, in a principal amount not to exceed $200,000, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for, and consistent with, the proper performance by it of service to the public as a common carrier, and will not impair its ability to perform that service, and (b) is necessary and appropriate for such purposes.

An appropriate order will be entered.

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